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* The annexes can be consulted in the files of the Secretariat.

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CONTENTS

	Paragraphs	Page
INTRODUCTION	1-21	3
I. A CONCEPTUAL FRAME OF REFERENCE ABOUT THE VULNERABILITY OF MIGRANTS AS SUBJECTS OF HUMAN RIGHTS	22-64	7
A. The problem	25-27	8
B. Basic premises	28-30	9
C. What is "vulnerability"?	31-38	10
D. The social construction of vulnerability	39-42	13
E. From vulnerability to human rights as empowerment	43-49	14
F. The "labelling" of immigrants as potential deviants	50-64	16
II. THE QUESTION OF "OBSTACLES"	65-67	21
CONCLUSIONS	68-72	23

INTRODUCTION

1. This document is not to be taken as a final report of the working group of intergovernmental experts on the human rights of migrants established by Commission on Human Rights resolution 1997/15 of 13 April 1997[1] entitled "Migrants and human rights". This is to be taken as one element to be considered for the final report of this working group.

2. The working group interpreted its mandate to "gather information"[2] as a need to substantiate the assumptions made by the Commission in resolution 1997/15. This interpretation led to a discussion on the means to be used. Given the time constraints, the working group agreed that a questionnaire should be as simple and short as possible, since the main objective was exploratory. Thus, four questions were finally included.

3. The first question aimed at obtaining a general picture of basic demographic data pertaining to migration (see annexes). The second aimed at obtaining statistics and qualitative information on measures taken by Member States to promote and protect the human rights of migrants. The third question aimed at obtaining indicators of the level of awareness of Member States about the human rights problem of migrants referred to in Commission resolution 1997/15. It was not, however, intended to obtain precise data or a qualitative description of those human rights problems. The fourth question aimed to ascertain the level of importance ascribed by Member States to the existing means for combatting violations of the human rights of migrants by asking if they have signed and ratified specific United Nations conventions and other international standard-setting normative instruments addressing human rights of migrants. The text of the questionnaire is contained in the annexes.

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[1]Operative paragraph 3 reads: "Decides to establish, within the approved overall budget level for the current biennium, a working group consisting of five intergovernmental experts, appointed on the basis of equitable geographical representation after consultations with the regional groups, to meet for two periods of five working days prior to the fifty-fourth session of the Commission, with a mandate: (a) To gather all relevant information from Governments, non-governmental organizations and any other relevant sources on the obstacles existing to the effective and full protection of the human rights of migrants; (b) To elaborate recommendations to strengthen the promotion, protection and implementation of the human rights of migrants."

[2]In the first meeting of the working group in November 1997 a decision was made to design a questionnaire looking for quantitative and qualitative information about the human rights status of migrants from Governments and non-governmental organizations (NGO's) and intergovernmental organizations (IGO's). The Secretary-General, in December 1997, addressed that questionnaire to Governments, competent United Nations bodies, specialized agencies, intergovernmental and non-governmental organizations. In spite of the very short time given to these informants (less than two months), an unprecedented number of Governments (38) and NGO's-IGO's (16) responded.

4. In spite of the short period of time (2 December 1997 to 16 February 1998) given to Governments and intergovernmental organizations and NGO's to respond to the questionnaire and, in spite of the delicate nature of the theme of reporting on matters of human rights violations in the respective countries, 36 Governments, and 24 IGO's-NGO's submitted a response. Given the standards of responses, these numbers could be considered better than usual.

5. The responses were, however, heterogeneous. Very few included a detailed response. Many of them responded with reference to documents sent to other United Nations bodies responding to similar requests for information. Responses to the first question on demographic data varied in the year of reference, some quoting 1990 census data.

6. The analysis of these responses required a preliminary effort to reach a reasonable level of homogeneity in order to make some comparisons between countries. An effort to systematize the responses resulted in the documents contained in the annexes.

7. The work of the synthesis required an effort to complete the information through specific requests to the respective Missions representing countries in Geneva and/or consulting official publications from the United Nations, International Labour Office, Organization for Economic Co-operation and Development, International Organization for Migration and Organization of American States.

8. A review of the literature on international migration and human rights was carried out in order to ascertain the extent to which the responses added something significant to the understanding of the problems of human rights of migrants. In order to allow a systematic comparison between responses, these were analysed, searching for what Governments have done to promote and protect the human rights of migrants, as well as what they responded to question 3 (Have there been manifestations (how many cases) of racism, xenophobia and other forms of discrimination against migrants in your country and against your nationals in another country?).

9. A scale was designed by giving scores to responses following a criterion on the extent to which Governments have done more or less in promoting and protecting the human rights of migrants. The information contained in the responses to question 2 of the questionnaire was pondered by answers given to questions 3 and 4.

10. The scale went from positive 0 to 3 to negative 0 to 3. The maximum was given to responses where the comparisons between all of them indicated the highest effort to promote and protect the human rights of migrants.

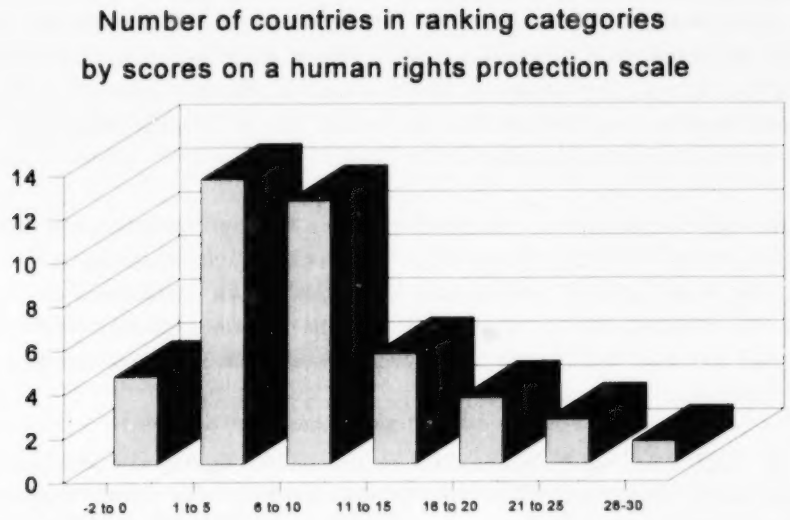
11. Negative numbers were given to countries where problems of discrimination, xenophobia or racism were reported by Governments themselves or IGO-NGO responses and nothing was found to combat such problems. A score of negative 3 was given to a country where information was available in the responses about the most serious cases of violation of human rights with no data about measures to combat such problems.

12. The scale was constructed using exclusively the information contained in the responses. This scaling procedure is similar to what a teacher does to grade exams "by the curve", where the minimum score is given to the poorest performance in comparison to the rest of the graded exams, and the maximum grade is given to the best of them. This way, the ranking of all the cases examined is completely endogenous.

13. Given the fact that many countries about which there are published reports on serious cases of violation of human rights did not respond to the questionnaire, an evaluation of a specific country's performance in the protection or promotion of human rights of migrants would be unfair, let alone invalid from a scientific point of view. The analysis of the data is limited to a comparison between the countries that responded to the questionnaires. Its findings are not valid for a universal comparison between countries, since the majority of them did not respond.

14. An assumption could be made that those countries whose Governments responded were showing a certain degree of awareness and a sense of responsibility about problems of violation of the human rights of migrants. Concomitantly, another assumption could be made, that Governments which did not respond to the questionnaire include those where there is less awareness or interest in these problems of human rights of migrants.

15. Findings are presented here without reference to specific countries. The value of this scale should be judged in the extent to which it shows the grouping of countries along the various points of the scale. Therefore it shows where the majority of countries stand in regard to the promotion and protection of human rights of migrants. The main findings are presented in the following graph.



Source: United Nations Commission on Human Rights-Working group of intergovernmental experts on the human rights of migrants, 1998.

16. This graph portrays a poor showing even among those countries whose Governments responded to the questionnaire, about which we have assumed a higher level of awareness or interest on the problem in comparison to those Governments who did not respond to the questionnaire.

17. This finding, as limited as it is, provides an empirical basis for the identification of a serious problem. That is, the contrast or contradiction between the interest and concern of Member States for this problem and what they are doing about it.

18. In addition to the findings presented in the graph, another empirical basis supporting this statement can be derived from some preliminary results of a general survey carried out in 1998 by the International Labour Organization Committee of Experts. As of the first week of August, 77 responses had been received. 36 of them indicated the intention not to ratify either the International Labour Office or the United Nations conventions on the matter. Only five indicated that they are examining ratification. Only one had ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

19. These facts appear in startling contradiction to the wide concern about the worsening of the human rights problems of migrants expressed by the Commission on Human Rights in approving the creation of the working group in resolution 1997/15.

20. The explanation of this contradiction can only be tentative. It is obvious that it requires more generalizable data, including from the countries whose Governments show no interest in responding to the questionnaire.

21. A review of the literature relevant to the human rights of migrants and an interpretation of the responses and lack of them, suggested the need to produce a conceptual frame of reference by a further definition of the problem of human rights of migrants around the notion of the vulnerability of migrants.

I. A CONCEPTUAL FRAME OF REFERENCE ABOUT THE VULNERABILITY OF MIGRANTS AS SUBJECTS OF HUMAN RIGHTS

22. The level of awareness among Member States about a trend of worsening human rights of migrants in many parts of the world was revealed by the Commission on Human Rights resolution which created a five-member working group to study the problem.

23. Other indications of a growing preoccupation in the international community about the violation of human rights of migrants have appeared in international meetings[3] and resolutions.[4] The International Labour Organization pioneered standard-setting efforts calling the attention of the international community to the increasing need for regulations to prevent the violation of the human rights of migrant workers including irregular or undocumented workers.[5]

24. One of the most relevant factors which led the Commission on Human Rights to create the working group on international migrations and human rights was: "the increasing manifestations of racism, xenophobia and other forms of

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[3]In the final report of the Ferney-Voltaire Round-table on Effective Respect for the Human Rights and Dignity of Migrants: New Needs and Responses, organized in 1996 by the International Institute of Humanitarian Law and the International Organization for Migration, it is stated on page 1: "Many migrants today face situations where protection of their human rights is minimal or absent. Particularly vulnerable groups include women migrants, victims of trafficking, and those who are undocumented".

[4]During its session in 1998, the Commission on Human Rights approved the following resolutions: 1998/15, "International Convention on the Protection of the Rights of all Migrant Workers and their Families"; 1998/16, "Migrants and human rights"; 1998/17, "Violence against women migrant workers"; 1998/26, "Racism, racial discrimination, xenophobia and related intolerance", as well as resolution 1998/10 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

[5]Some of the best known standard-setting sources are: the ILO Migration for Employment Convention (No. 97) of 1949 and, the Migrant Workers Convention (No. 143) of 1975. The most recent tripartite meeting of experts on future ILO activities in the field of migration took place in 1997 for which a discussion paper was prepared by ILO under the title, "Protecting the Most Vulnerable of Today's Workers". Recent publications relevant to the work of ILO on the question of migrant workers include: W. R. Bohning, Employing Foreign Workers: A Manual on Policies and Procedures of Special Interest to Middle and Low Income Countries (1996); M.I. Abella and M.A. Abrera-Mangahas, Sending Workers Abroad: A Manual for Low and Middle-income Countries (1997) and; R. Billsborrow, G. Hugo and H. Zlotnik, International Migration Statistics: Guidelines for Improvement of Data Collecting Systems (1997).

discrimination and inhuman and degrading treatment against migrants in different parts of the world" (resolution 1997/15).

A. The problem

25. A combination of the empirical elements presented in the graph and those derived from the review of the literature suggests that, (a) there is a world-wide problem of human rights of migrants; (b) there is an awareness of this problem among a significant number of national Governments of both sending and receiving countries; and (c) international standards have been agreed upon by Member States with the purpose of solving or alleviating the problem.[6] Thus, two questions arise; why there is a contrast between what Governments say and what they do about the problem of human rights of the migrants? And, why this problem is widely perceived as growing?

26. A basic fact is that the international community, or more precisely, the United Nations or any other of the intergovernmental organizations, have not been successful in establishing a mechanism out of which a political or economic or some other significant cost might be derived for a Member State where patterns of violations of human rights of migrants occur. The fact remains that there is a world-wide problem of violation of human rights of migrants.[7]

27. It is assumed here that the recommendations the working group on the human rights of migrants require the elaboration of a reasonable basis for the explanation of the origins of the problem at hand. This task could be facilitated by an elaboration of a workable definition of the problem.

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[6]The most important international standards specifically applicable to migrants human rights are: International Covenant on Civil and Political Rights (adopted by General Assembly resolution 2200 A (XXI) of 16 December 1966, entered into force 23 March 1976); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by General Assembly resolution 39/46 of 10 December 1984; entry into force 26 June 1987); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted by General Assembly resolution 43/173 of 9 December 1988). The most comprehensive standard (which has not entered into force) is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted by General Assembly resolution 45/158 of 18 December 1990).

[7]Resolution 1998/10 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, states in one of its preambular paragraphs that it is: "deeply concerned by the increasing phenomena of extreme racism, xenophobia and violent intolerance which affect, in particular, migrant workers, men and women, and the members of their families".

B. Basic premises

28. The basic premises to be discussed hereafter refer to the concept of vulnerability of migrants as subjects of human rights. United Nations High Commissioner for Human Rights Ms. Mary Robinson's address at Oxford University in 1997 included a notion of human rights which is fundamental for the understanding of the concept of vulnerability as it is used in this report. She said, "one lesson we need to learn, and to reflect in our approach, is that the essence of rights is that they are empowering"[8]. Thus, vulnerability is understood here as a condition of a lack of empowerment. It is crucial in this conceptual approach to understand such a lack of empowerment as a man-made phenomenon or a condition imposed on a person by the power structure of a country. One basic premise central to this report is that there is a structural and a cultural vulnerability ascribed to non-nationals, foreigners or immigrants, by the "nationals"[9] of a given country. The "structural" nature derives from the existence of a power structure which empirically shows that in any given national society, some have more power than others. Power as a shaping factor of social relations is taken here from the writings of the American sociologist Howard S. Becker who included it in his theoretical development of the explanation of deviant behaviour:

> Differences in the ability to make rules and apply them to other people are essentially power differentials (either legal or extralegal). These groups whose social position gives them weapons and power are best able to enforce their rules. Distinction of sex, age, ethnicity and class are related to differences in power, which accounts for differences in the degree to which groups so distinguished can make rules for others[10].

29. Further elaboration of this sociological approach to power differentials lies ahead. The cultural nature of vulnerability derives from the set of cultural elements (stereotypes, prejudices, racism, xenophobia, ignorance, and institutional discrimination) with derogatory meanings which tend to justify the power differentials between "nationals" and non-nationals or immigrants.

30. The combination of (a) power differentials based on a power structure where the immigrant is at a lower level than nationals, with (b) the set of cultural elements which justify it, results in various degrees of impunity for the cases of violation of the human rights of a migrant. This impunity becomes

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[8]Robinson, Mary, Human Rights, No. 1 (winter) 1997/1998, p. 6.

[9]The term is used in its sociological connotation. That is, the set of characteristics of a person which the "national" society recognizes as defining a "national", as opposed to a non-national, a foreigner or an immigrant.

[10]Becker S. Howard, Outsiders: Studies in the Sociology of Deviance, New York, N.Y.: The Free Press. 1968. pp. 17-18.

then an empirical indication of the powerlessness of the migrant which is equal to his or her vulnerability. "Impunity" here is understood as the absence of economic, social or political costs for the violator of the human rights of a migrant.

C. What is "vulnerability"?

31. The responses received to questions 2, 3 and 4 of the questionnaire, suggest an explanation of the contrast between the concern of an increasing number of countries for the violation of the human rights of migrants and the lack of actions taken by the generality of Governments and the inefficacy of rules approved by the United Nations and other standard- setting international bodies. This explanation however can only be tentative, pending further research on countries whose Governments have not responded to the questionnaire.

32. The question of vulnerability of migrants has to be understood in terms of its social nature, its causes, as well as its consequences, in order to go beyond what seems to be a stalemate situation. There is an increasing consensus that the factor most commonly associated to the abuses of human rights of the migrants is their vulnerability. There has not been sufficient discussion however, of the origin or the causes of vulnerability of migrants. This has provoked a case of what Aristotle called "en Arche aiteisthai", translated by Romans as "petitio principii", where the argument about the human rights problem of migrants is explained by their vulnerability, a condition of those who are victims of violation of their human rights.[11]

33. This section of the report focuses on the social nature of the vulnerability of migrants as subjects of human rights. First, an operational definition: vulnerability is understood in this report as a social condition of powerlessness ascribed to individuals with certain characteristics, who are perceived to deviate from those ascribed to the prevailing definitions of a "national". Vulnerability is a social condition associated to outcomes of

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[11]The following example is intended as an illustration of the limits reached by the argument that refers the problem of violation of the human rights of migrants to their vulnerability, without a reference to what causes it. Resolution 1998/10 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities reads as follows:

> "Reaffirming that the degrading treatment directed against migrant workers in certain parts of the world has made them one of the most vulnerable groups in the contemporary world."

This is tantamount to trying to solve a health problem by a reference to its symptoms.

impunity for those who violate the human rights of those "labelled"[12] as deviants.

34. One of the most important elements of this definition is that vulnerability is not an inherent characteristic of individuals who migrate out of their country of origin. More precisely, vulnerability is not inherent to racial characteristics, or to a country or an ethnic origin, or to the conditions of underdevelopment of the country or the region of origin. Vulnerability is not a condition brought by an immigrant to a country of destination, regardless of the legality of his or her entry or stay in a given country. In this sense, the causes of vulnerability should not be confused with the causes of immigration. In general terms, international migrations, being for job purposes or family reunification, are indeed provoked by the interplay of factors located in both the country of origin and the country of destination. It could be said, then, that international migrations are, in general, the result of a combination of endogenous and exogenous causes.

35. In contrast, vulnerability is a condition that arises out of the social interaction between a foreigner entering a country and its "nationals". Vulnerability here is an endogenous phenomenon. It is essentially related to the violation of human rights taking place in a country of destination of an immigrant. It is the opposite of a situation of full respect of immigrants' human rights as defined by the Universal Declaration of Human Rights and current international standards.[13] In this sense, using High Commissioner Robinson's notion of human rights quoted above, the vulnerability of migrants

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[12]Howard S. Becker developed a sociological assumption that deviance (behaviour or actors, who are perceived as deviating from socially accepted norms) is what people label as such. See, Outsiders: Studies in the Sociology of Deviance, Toronto, Ontario, Canada; Free Press of Glencoe, 1963. Becker suggested that in a sociological context, "labelling" a person as deviant is an act of power under the assumption of power differentials that characterize the structure of any society.

[13]A review of the main sources of standards specifically addressing international migrants was conducted recently by the International Organization for Migration in which the following were identified as the "core migrant rights" in an official document entitled: "IOM and Effective Respect for Migrant Rights", presented at the Round-table on Effective Respect for the Rights and Dignity of Migrants: New Needs and Responses (February 9-11, 1996): right to life; prohibition against slavery/slave trade; prohibition against torture or other cruel, inhuman or degrading treatment; prohibition against prolonged arbitrary detention; prohibition against systematic racial discrimination; right to self determination; right to humane treatment as a detainee; prohibition against retroactive penal measures; right to equality before the law; right to non-discrimination; right to leave any country and return to one's own country and the principle of non-refoulement.

After this list, IOM states: "These rights apply to all people, and thus to all categories of migrants, be they labour or economic migrants, refugees, displaced persons or others. Indeed, such categorization is not necessary for entitlement to these rights. All people involved in the migration process, including those in the "grey areas" of migration are guaranteed these rights" (pp. 11-12).

is the opposite of an empowerment. That is to say, a condition of disempowerment.

36. There is an important difference to be made between a condition of vulnerability ascribed to an individual in his or her country of origin and a condition of vulnerability ascribed to the same individual in a country other than his or her own. It might be that such an individual was suffering a condition of vulnerability of his or her human rights as a national of his or her country of origin. The juridical nature of this vulnerability is analytically different than the condition of vulnerability ascribed to the same individual in a different country. In the first case, vulnerability is often defined as an internal matter, concerning the relationship between a national and his or her Government. In the second case, vulnerability is an international matter, concerning the human rights of a foreigner in a country different than his or her own.

37. Even though there is a growing consensus in the international community that violation of human rights within a country, either by government or non government actors of the same country as that of their victims, is a matter for the legitimate concern of other countries or international bodies, it happens that, even in the case of gross violations of human rights of citizens by their national Government, the argument of "this is an internal matter" or that of, "this is within the realm of our sovereignty" has been successfully made by many Member States when a question of nationals' human rights violation within their country was made at some international forum. It is certainly debatable the extent to which a national Government can go in the open violation of the human rights of its citizens and still claim no internal affairs open to criticism by other countries or international sources. The case of "apartheid" is one in which the United Nations and the community of nations shared the view of such an "internal" case as intolerable, and acted accordingly. A country was criticized for the violation of human rights of its own nationals in international forums. On the other hand, the principle of no foreign intervention in the internal affairs of a sovereign State has been a cornerstone of international relations and the juridical basis for peace in the international community. The important point here is that it is debatable the extent to which vulnerability of people within their own country can be dealt with legally by other countries or international bodies, whereas it is hardly questionable whether the "vulnerability" of immigrants is indeed an international matter. Failure to recognize the difference between the internal nature of this kind of vulnerability and the international nature of an immigrant/foreigner's vulnerability as a subject of human rights, renders tautological the argument for a definition or solutions for the problem.

38. The condition of vulnerability of human rights of an immigrant/foreigner is, by definition, an international matter. It has to do with an obligation derived from a country's interest in belonging or participating as a member

of the international community. More specifically, it is associated to the principles agreed upon by the community of nations as the Universal Declaration of Human Rights, vis-à-vis a citizen of another country. These human rights are a fundamental part or raison d'être of the United Nations. In the context of international law it is considered as within "State responsibilities" to comply, as a Member State, with the human rights of individuals as human beings, regardless of their nationality or country of origin. Full compliance with the Universal Declaration of Human Rights is what in international law is understood as State responsibility vis-à-vis the standard as established by the Universal Declaration of Human Rights, accepted as a legal responsibility, concomitant to be accepted as a United Nations Member State. It is also a responsibility of the same kind vis-à-vis a legitimate claim of the country of origin of immigrants or, the immigrants themselves. Such full compliance with the Universal Declaration would be equivalent to the empowerment the High Commissioner Robinson alluded to in her Oxford address. Vulnerability, as the opposite of a full compliance with human rights, is what this report is about.

D. The social construction of vulnerability

39. This notion of vulnerability of immigrants involves some assumptions and concomitant paradoxes. The relevance of its practical meaning derives from the fact that immigrants' vulnerability is a social construct which can be deconstructed. Not, however, without understanding first its process of coming into being.

40. On the one hand, there is a conventional assumption that foreigners/immigrants do not have or should not have complete equal rights as nationals do. As congruent as this might be with international standards on sovereignty, it implies a difference, legitimized by the State, between foreigners/immigrants and nationals. In its consequences, this difference becomes one of power. It is implemented when a national wants to transfer it to a wider social context than that alluded to by the text of the legal difference. This happens in real life in a context of a social interaction between a national and a foreigner/immigrant, where real or perceived conflict of interest emerge between the two of them. A particular State might not accept a discriminatory behaviour against foreigners/immigrants by its nationals but the distinction it makes in favour of the latter by granting them rights, restricted to the former, might be socially processed or transformed as a basis for a power differential. The lower level becomes de facto ascribed to the foreigner/immigrant.

41. There are of course a great variety of degrees in which such lower status is socially ascribed to a foreigner/immigrant. Preferences or protections granted by a State to its nationals vis-à-vis foreigners are generally understood as legitimate parts of the matter of sovereignty. They do not come

from the abstract. Usually, they are rooted in national history. Sometimes, these preferences and protections are associated with ideologies or traditions or, a history of certain international events as they have been defined and taught based on the respective national history, such as wars or, any other instance of domination of one country over an other. For example, as legitimate as is the sovereign right of a country to follow principles of jus sanguinis for the ascription of nationality, it establishes a difference which then might be abused by nationals to the extreme of violating the human rights of immigrants.

42. Looking at patterns of abuses of immigrant rights as they are reported in some of the NGO responses (see annexes), particularly the case of trafficked migrant women and/or irregular domestic migrant workers, irregular migrant farm workers and migrants who are victims of trafficking, an hypothesis could be drawn. This hypothesis derives logically from the conceptual frame of reference in which the concept of vulnerability is understood here. Namely, that their ascribed vulnerability of migrants as subjects of human rights could be associated with the low cost of the services or labour they deliver. This in turn is associated with a demand for them in recipient countries, which in turn is associated with the increase in numbers of outmigrants currently observed. There are numerous implications of the virtual circularity of the process suggested in this sequence. For the purposes of this report only one implication is to be identified. This is that if the vulnerability of immigrants is reduced, the closer it gets to zero, the more likely it is to increase the cost of delivery of migrant services or labour in the recipient countries. Thus, the more likely it is then to reduce the demand for them and the more likely to discourage economically related outmigration.

E. From vulnerability to human rights as empowerment

43. What is stated above is not to suggest that a sovereign right of a country to determine who should enter its national territory is a source of violations of human rights. Nor that foreigners/immigrants should have all the rights of nationals, including voting rights. It is to suggest an explanation of the sociological nature of vulnerability of immigrants, which is aimed at solving the contradiction between expressions of deep concern by an increasing number of countries about what is viewed as growing violations of human rights of migrants and what countries are actually doing about it.

44. The notion of vulnerability used here departs from the notion that, privileges or protections legitimately given by the State to its nationals, are logically exclusionary of non-nationals. Regardless of any discriminatory intent from the part of the legislative branch of a State, privileges or protections issued in favour of nationals, by definition, exclude non-nationals. That exclusion, which is basically legitimate implies the basis for

a power differential between the national and the non-national which in turn might become the source of a de facto abuse of power against those excluded.

45. A paradox arises when a State, in its legitimate exercise of its sovereign rights, establishes a distinction between nationals and non-nationals thus, in its consequences, creating power differentials between them. At the same time, that State commits itself, vis-à-vis the community of nations, to defend the human rights of those rendered power-less by that legal distinction. A contradiction emerges when, on the one hand, those nationals empowered by such a legal distinction, encounter a non-national and takes the distinction to a wider social level than what it was intended in the legal distinction itself. At the same time, the same State tells the national that the non-nationals have human rights that limit the power that the former can exercise over the latter. The challenge a Member State faces is, how to reconcile its sovereign right to issue a privilege or a protective measure in favour of its nationals, vis-à-vis non-nationals and, at the same time, comply with international standards of immigrants' human rights. In theory, there should not be contradictions between the sovereign right expressed in the State's protection of its nationals vis-à-vis foreigners/immigrants and the State's protection of human rights of the latter. Doing both, however, is often viewed as a zero-sum game.

46. Those who believe that granting human rights to immigrants, particularly if they are irregulars, is detrimental to a national's rights or principles of legality, tend to reinforce the idea of a power differential that ends up in impunity for the violation of the human rights of the immigrants. A basic principle of human rights is that entering a country different from his or her own, in violation of that country's immigration laws, does not deprive such an "irregular immigrant" from his human rights. Nor does it erase the obligation of a Member State to protect them. If this principle of human rights applies to war prisoners as well as to the worst of criminals, there is no logic, other than that of sheer power, to deprive an irregular immigrant of his or her human rights by arguing that his or her entry or stay in a country is in violation of its immigration laws.

47. The understanding of and apparent dilemma between the rights of nationals to be protected by their State and the legal or moral obligation of a State to protect the human rights of foreigner/immigrants could be derived from an understanding of power differentials in the shaping of social interactions between nationals and immigrants. Sociologists have tried to understand how power differentials shape social relations.

48. There are numerous sources of power in a given society. These sources are generally not distributed equally among its members. Whatever the degree of

inequality derived from such a de facto unbalanced or skewed distribution of sources of power, some have more power than others.[14]

49. Those with more power tend to maintain norms and values which perpetuate whatever system of distribution of power happens to have led to the power differentials benefiting them. Perpetuation of norms and values in any given society has to do with the perpetuation of a power structure. Such a perpetuation of norms and values includes the social definition of deviants. This becomes an important function to the extent that perceived deviations imply a challenge if not a threat to the prevailing system of norms and values. That is, those perceived to deviate or set themselves apart from these norms and values become socially defined as deviants from the perspective of those interested in social behaviour to be carried on in conformity with the established norms and values.

F. The "labelling" of immigrants as deviants

50. The social definition of a deviant involves a virtual labelling process of individuals so defined. This labelling process does not imply generally a sheer exercise of power. It involves usually the existence of a normative context of legitimacy of the labelling process and the exercise of power through legitimate law enforcement officials. In the final instance, the social definition of a deviant involves a power differential between those who define people as deviants and those so labelled.[15]

51. In the social context of everyday life people interact with others basically perceived as sharing certain context of norms and values. This is

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[14]A basic premise of Becker's labelling theory can be found in these words: "Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labelling them as outsiders. From this point of view, deviance is not a quality of the act a person commits, but rather a consequence of the application by others of rules and sanctions to an "offender". The deviant is one to whom that label has successfully been applied; deviant behaviour is behaviour that people so label". Becker, Outsiders, p. 9.

[15]The following paragraph alludes very eloquently to the application of "labelling" theory to immigrants: "There is one other element in Hughes' analysis we can borrow with profit: the distinction between master and subordinate statuses. Some statuses, in our society as in others, override all other statuses and have a certain priority. Race is one of these. Membership in the Black race, as socially defined, will override most other status considerations in most other situations; the fact that one is a physician or middle-class or female will not protect one from being treated as a Black first and any of these other things second. The status of deviant (depending on the kind of deviance) is this kind of master status. One receives the status as a result of breaking a rule, and the identification proves to be more important than most others. One will be identified as a deviant first, before other identifications are made. The question is raised: "What kind of person would break such an important rule?" And the answer is given: "One who is different from the rest of us, who cannot or will not act as a moral human being and therefore might break other important rules". The deviant identification becomes the controlling one." Becker, Outsiders, pp. 33-34.

the sense of what Max Weber meant with his concept of Gemeinter Sinn[16] or what Alfred Schuttz meant with his notion of intersubjectivity as the cement of mutually meaningful social interactions or, what Bourdieu meant with his concept of habitus, as essential component of social relations. That is, the culturally shared understanding of an action, a gesture, or a symbolic expression emitted in a pattern and exchanged by actors in the context of their social interaction. Here, the inter-subjective or culturally shared meaning by the members of a community defines who is, and how one recognizes who is not, a member of that community. When a person encounters another who does not conform to such a habitus or shared understanding, either by his or her unusual or "different" appearance or, by any other means of communication, a "labelling" process might begin. Whoever has more power is more likely to make his or her labelling of the other "stick". This may or may not result in social consequences. "Labelling" is understood as a social process. This implies an historical context in which a power structure and a system or values and norms supporting it, evolves from elementary to more complex forms of what Weber calls "legitimate authority"[17]. In everyday life, however, it always involves a social interaction between one who label another as "deviant" and the one so labelled. The labelling of a person as such, implies some sort of an exercise of power. It could be a legitimate power supported by the norms and values upheld by the State; it could be an abuse of that power.

52. If one accepts the premise derived from the labelling theory that labelling involves a social context based on power differentials[18], the vulnerability of people with certain characteristics, real or perceived, would be equal to the likelihood of not having the power to challenge the people doing the labelling as "deviant". In other words, the vulnerability of migrants is equal to the likelihood of being powerless enough in another country so as to be labelled as deviant by "nationals". They do not perceive the immigrant to conform, by appearances or behaviour, to the prevailing

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[16]Gemeinter Sinn is a core concept in Max Weber's theory of social relations. It is understood here differently than most common translations of Weber to English where this concept is rendered psychological in nature as it was translated by Talcott Parsons as "subjective meaning". Here, Weber's concept of Gemeinter Sinn is understood in its original sociological nature as the cultural meaning or as the inter-subjectively shared meaning by members of the same community as actors of patterned social interactions. Max Weber developed this concept in the first chapter of his posthumously published book, Grundriss der Sozialokonomic, III Abteilung, Wirtschaft und Gesellschaft, Verlag von J.C.V. Mohr (Paul Siebeck) Tubinga. 1925.

[17] This is what Max Weber defines as the "ideal type" of a system based on a "legal authority with a bureaucratic administrative staff", which is characteristic of most modern societies, as opposed to the other two "ideal types" of authority, namely "traditional authority" and "charismatic authority". Max Weber, Economy and Society, chapter III.

[18]See footnote 9.

system of norms and values based on which the social definition of a "national" is derived.

53. The importance of understanding the social process through which a condition of vulnerability is ascribed to an immigrant has to do with a clear definition of the problem for those concerned with the violation of human rights of the international migrants and a realistic understanding of feasible solutions.

54. The bottom line here is the same as in the case of so many standards reflecting internationally shared concerns of Member States about a human rights problem, namely, how to enforce United Nations standards. In the case of international migrants the problem is not a lack of international standards. The problem is one of political will. This was recognized in a recent international conference on the subject, in regard to the conspicuous absence of ratifications of the most comprehensive body of norms on the subject approved in 1990 by the General Assembly as the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families. In that conference an official document of IOM concluded:

> Political realities cannot, however, be ignored. Many countries are opposed to the recognition and protection of clandestine and irregular workers. The recent resurgence of xenophobia and racism has led to anti-immigrant sentiment, meaning that Governments are exceedingly cautious in this area.[19]

55. The "political realities" alluded to by IOM's statement should not be allowed to open a field of hypocrisy between public concerns of Member States for the growing tendencies of human rights violations of migrants and staunch refusals to ratify United Nations standards approved to combat such tendencies.

56. One advantage of applying the "labelling theory" to explain the condition of vulnerability of migrants in the receiving countries is that the same assumptions of such a theoretical frame can lead one to a logical conclusion suggesting the way toward a solution. The analytical premise to be followed for such a purpose is, if the vulnerability of migrants means lack of power, the opposite should be their empowerment. This, however, has to take into account what the IOM statement meant as the "political realities" that work against such an empowerment. This means that, whatever the empowerment of migrants means, it has to be a realistic one.

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[19] "IOM and Effective Respect for Migrants' Rights" (page 11), presented at the Round-table on Effective Respect for the Rights and Dignity of Migrants: New Needs and Responses, February 9-11, 1996, Ferney-Voltaire, France.

57. Before getting there, some precision should be added to the working concept of the problem discussed above. This was defined as the vulnerability of the migrants. There is another problem, however, which is concomitant to that of vulnerability. That problem is the gap between (a) the manifest concern for the violation of the human rights of the migrants by Member States and, (b) the de facto refusal to accept the enforceability of standards by not ratifying the respective United Nations instruments. The gap between (a) and (b), is an integral part of the basic problem understood as the vulnerability of migrants.

58. There is an important analytical distinction between the two problems. A necessary condition for the creation and implementation of direct measures addressed to the vulnerability of migrants, involves an internal process of decision-making by Member States individually. In contrast, a necessary condition for the reduction or the closing of the gap between (a) and (b) above, involves an international mechanism, created in accordance with conventional United Nations rules of decision-making.

59. The first case can be illustrated by countries where legislation has been enacted to empower immigrants to protect themselves against violations of their human rights. This is the case, for instance, of countries that have granted voting rights to immigrants in municipal elections (Spain, Sweden, Portugal; see annexes). These cases illustrate a comparably high level of commitment of certain countries, in the exercise of their respective sovereignty, to grant a significant degree of empowerment to otherwise powerless immigrants.

60. Unfortunately, there is no correlation between seriousness of patterns of violations of immigrants' human rights and the expressed concern of countries to combat such violations. In most cases, there is a ratified commitment of such countries to international standards by which they should not allow such patterns of violations of human rights against immigrants/foreigners. A consensus is growing in the sense that these violations are worsening in many parts of the world. Therefore, there is no other way to do something relevant to combat this trend, than bringing some pressure from the part of the international community to countries where serious violations of immigrants' human rights are currently happening.

61. The gap between (a) and (b) is not likely to close by the creation of more international standards focussing the violation of human rights of migrants. There has to be something more affirmative than what it has been done so far by the international community to reduce such a gap, perhaps something at a lower level than what it might be producing resistance to the ratification of the existing standards. A catch-22 situation has resulted from existing international standards to combat violations of the human rights of the migrants, which countries refuse to ratify. A need to produce more standards

to alleviate a problem, which an increasing number of countries agree on, requires some international action. The problem seems to be that Member States who have approved something to address the problem of violations of human rights of the migrants, do not seem to agree to go as far as the proposed international standards mean to take them. It is increasingly apparent that something new and different should be done at the international level to break the vicious circle.

62. The international community seems to have the clock of globalization running against its common goals of peace and rationality by allowing such a vicious circle to continue. In the meantime, it is involving more and more individuals in the migratory flows around the world. The likelihood that this migratory phenomenon will become one of the most serious challenges to the stability of international relations of the twenty-first century is now ominously high. The words of the High Commissioner Mary Robinson are again fitting. She said "today's human rights violations are the causes of tomorrow's conflicts".[20] It would be a mistake to attribute such a challenge only to the "exogenous" causes of rates of population growth and underdevelopment of sending countries.

63. Vulnerability of immigrants as subjects of human rights might be at the centre of a rational response to the challenges derived from increases in migratory flows around the world.[21] Concerted action within the United Nations context to reduce the vulnerability of migrants by means of an affirmative action plan could lead toward more manageability of economically related migratory flows.

64. This is not to suggest that current efforts to obtain the ratification of existing international standards such as ILO conventions Nos. 97 and 143 and the 1990 Convention on the rights of migrant workers, should be relinquished. It is to suggest that, while such an objective of reaching a sufficient number of ratifications of these instruments is achieved, an intermediate mechanism toward a solution should be created with due acknowledgement of the "political realities" alluded to by the ILO conclusion quoted above. The human rights problem of international migrants as it has been conceptualized here is not lack of standards. In the words of High Commissioner Robinson, "the normative work is largely done. The international human rights standards are in place. The task for us all, given new impetus by the focus of next year, will be to implement them".[22] On this matter there is a need for consultation with working

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[20]Robinson, Mary, Human Rights, p. 8.

[21]The Programme for Action of the United Nations Conference on Population and Development, Cairo (September 1994), included an estimate of the number of international migrants world-wide in excess of 125 million.

[22]Robinson, Mary, Human Rights, p. 9.

group members as to which United Nations mechanism to recommend in our final report.

II. THE QUESTION OF OBSTACLES

65. An important part of the mandate for the working group as stated in resolution 1997/15 of the fifty-third session of the Commission on Human Rights was to gather information on the "obstacles existing to the effective and full protection of the human rights of migrants". Questions 2, 3 and 4 of the questionnaire were intended to identify such obstacles. There was a wide spectrum of responses which is reflected in the graph in para. 15. Most action-oriented responses went from the establishment of government programs specifically designed to protect migrants' human rights on a permanent basis, such as the creation of the "Beta Groups" in Mexico[23]; to the creation of public funds specifically destined to assist and protect immigrant/foreigners; the creation of institutes for the study of racism and xenophobia against immigrants (Belgium); the creation and funding of programs of public information and education to combat prejudices and stereotypes against immigrants/foreigners (Spain); keeping statistics about incidents of xenophobia or racism against them (United Kingdom, Germany and France); and the creation of high level offices of government in order to deal specifically with migrants needs and their human rights(Portugal). It is noteworthy that, in the majority of Government responses there were only legislative changes in favour of immigrants' human rights with no indication as to their effectiveness or enforcement practices. The level of commitment to protect the human rights of migrants shown in these legislative changes varied significantly, from the establishment of Constitutional rights specifically for migrants (Turkey); to the granting of voting rights in municipal elections to immigrants[24]; to mere declarations in favour of the human rights of immigrants.

66. It is understandable that Governments were not more specific in their responses to our questionnaire in their references to "obstacles" for the full

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[23]These are special police task forces, selected and overseen by the three levels of government (municipal, state or provincial, and federal). The first such programme was initiated in Tijuana in 1990 and the most recent was created in the state of Chiapas, bordering Guatemala. The main task of the "Beta Groups" is to protect migrants' human rights, largely from practices of extorsion by members of other police forces. The graph contained in the annexes shows the abatment of police extorsion practices after the creation of the first "Beta Group" in Tijuana.

[24]Spain is the only country, among those which responded to the questionnaire, that reports a legislative project including the voting rights of legal immigrants at large, in municipal elections. Article 8 of the Maastricht treaty recommends this voting right be granted to migrants to and from member countries of the European Union. Belgium is the only country about which information was received in regard to the compliance to such a recommendation.

protection of human rights of migrants. The self-incriminatory potential of a direct question about them was a reason why the members of the working group decided not to do it in a direct way. The majority of the countries who answered the questionnaire, however, reported on some actions to promote the integration of immigrants into their economy and society.[25] These governmental actions or programs in favour of immigrants speak indirectly of the "obstacles" that the working group's mandate alluded to.[26] It could be argued that, whatever existing obstacles to the full protection of human rights of migrants, these are likely to be associated with the interest of those who benefit from the availability of the lower-cost labour immigrants represent. This has been recognized in some United Nations resolutions. These persons tend to be the same who benefit from the power differentials based on which lower wages and poor working conditions, which more often than not characterize immigrant participation in the labour markets of the recipient countries.[27] Interest of these immigrants employers points in the direction of maintenance of the structural conditions which allowed the availability of such low-cost labour. Hence, the maintenance of the conditions under which their vulnerability as subjects of human rights comes into being.

67. If such an interest on the part of immigrants' employers exists, the power they use to enhance these interests is equal to that needed to maintain them as de facto obstacles for the improvement of the human rights conditions of immigrants.

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[25]The answers provided by the Government of Sweden include the following words: "In order to strengthen the competence and increase the participation in the labour market, and to contribute to a positive social development and prevent marginalization in big city areas with a high concentration of immigrants, the Government has decided to contribute SEK 125 million to eight municipalities for use in local projects, set up and operated by the municipalities concerned, in cooperation with immigrants organizations", p. 33.

[26]This is the case of Spain, where a program of public information was created to combat prejudices and xenophobic stereotypes against immigrants. It is not difficult to assume that these programs allude to the existence of "obstacles" to the full respect of the human rights of migrants; namely, what the creation of these programs was trying to avoid or eradicate.

[27]A case in point is Sweden. Its response to our questionnaire includes the following words: "A recent Government bill (1994/95:218) to Parliament on a new labour market policy draws the attention to immigrants' needs for supportive measures. The Swedish Parliament authorized the expenditure of a maximum of SEK 5 million by the National Labour Market Board, through national employment offices, on special information efforts to promote the entry of refugees and immigrants into the labour market. One objective was to break down the resistance of employers to employing non-Scandinavian immigrants and refugees. Part of the money was used for employing more temporary staff at employment offices in areas with high concentration of immigrants". pp. 33-34.

CONCLUSIONS

68. The basic premise of the analysis presented here, that the vulnerability of immigrants is equal to a virtual disempowerment of their human rights, suggests the following conclusions: (a) that such disempowerment is socially constructed in a context of a de facto power structure; (b) that such disempowerment is a necessary condition for the use of migrants as suppliers of illegitimate but real, and sometimes massive, demand of migrant "services", or labour. The term "services" alludes here to the trafficking of migrant women and/or children for prostitution in the receiving countries (see further elaboration of this point in the annexes; (c) that the existence of such a de facto demand in the receiving countries is in itself a manifestation of power of the criminals involved in the trafficking of migrants, who operate as brokers and/or providers for the market of trafficked women's services; (d) that the case of immigrants as a labour force for legitimate activities in the receiving countries is different than the case of immigrants for illegitimate "services". This is mostly because immigrant labour demands in the receiving country tend to be supported by the legitimate power held by the employers of these immigrants in the power structure where the international labour markets involving immigrants operate (see further elaboration of this point in the annexes).

69. This is not to suggest that the power structures of the receiving countries where either the trafficking of migrant women and children or the hiring of immigrants, particularly those undocumented, are purely endogenous; nor to suggest an absence of responsibilities on the part of governments of the immigrants' countries of origin in the operation of these de facto international markets of immigrant "services" or cheap labour. The importance of the analysis suggested here lies in the need to conceptually deconstruct the process of social construction of the vulnerability of migrants once this has been accepted as a problem of human rights. The phenomenon of the high number of countries who have resisted the ratification of ILO and United Nations human rights standards benefiting immigrants, is not an act of nature. It is the result of real and concrete interests supported by real and concrete sources of power, benefiting real and concrete individuals who are at the basis of the obstacles for a full compliance of such human rights' standards. It is obvious that the inability of governments to enforce the Universal Declaration of Human Rights as its standards apply to international immigrants, renders them vulnerable as subjects of human rights and benefits those who are interested in the maintenance of migratory inflows of foreigners with zero or minimum rights, whose exploitation is concomitant to their powerlessness. Less evident is the real or apparent collusion of xenophobic and racist sentiments of members of the receiving society, with the inaction of governments, as the ratification of standard-setting instruments of international migrants' human rights and, with the interest of those who profit with the inflows of irregular or undocumented immigrants.

70. There is a three-fold logical conclusion from this reasoning: (a) the closer to zero action on the part of national governments to implement human rights standards for immigrants, the higher the vulnerability of immigrants, (b) the higher the impunity of violators of their human rights and; (c) the higher the need for United Nations involvement in the vulnerability of international migrants as subjects of human rights.

71. Concluding point (c) requires further elaboration. To the extent that there is empirical evidence of the resistance of a sizable number of national governments to ratify UN and/or ILO standard-setting instruments in favour of the human rights of the international migrants, one could assume little or no progress in the internal process of countries to improve on the conditions of vulnerability of international migrants in such countries. This is particularly important in the cases of receiving countries which national governments have expressed concern in international forums for the protection and promotion of human rights of international migrants. Under these circumstances it is reasonable to assume that a more affirmative role of the United Nations and more visible support of this role from non-governmental organizations in the combat against the vulnerability of international migrants, is the only way for a change in the apparently wider stagnation suggested by the survey findings of ILO and UN Commission on Human Rights cited in this report on the implementation of international standard-setting of human rights of these migrants.

72. We can be sure of one thing: the number of international migrants moving around the world is bound to increase. This trend and the problems of their vulnerability as subjects of human rights as discussed in this report, imply a spectrum of instability and conflict as one of the most serious problems of the twenty-first century, negatively affecting peacefully relations in the community of nations.

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3. Implementation of Commission on Human Rights resolution 1998/16, entitled "Migrants and human rights".

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